

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BERTRAM L. CLARKE,)	
)	CIV. S-05-121 GEB KJM
Plaintiff,)	
)	
v.)	<u>STATUS (PRETRIAL</u>
)	<u>SCHEDULING) ORDER</u>
THE HON. HERSHEL GOBER,)	<u>AND ORDER IMPOSING</u>
ACTING SECRETARY OF VETERANS)	<u>SANCTIONS</u>
AFFAIRS,)	
)	
Defendant.)	
_____)	

READ THIS ORDER CAREFULLY. IT CONTAINS IMPORTANT DATES WHICH THE COURT WILL STRICTLY ENFORCE AND WITH WHICH ALL COUNSEL AND PARTIES MUST COMPLY. A FAILURE TO COMPLY WITH THE TERMS OF THIS ORDER MAY RESULT IN THE IMPOSITION OF MONETARY AND ALL OTHER SANCTIONS WITHIN THE POWER OF THE COURT, INCLUDING DISMISSAL OR AN ORDER OF JUDGMENT.

The status (pretrial scheduling) conference scheduled in this case for June 20, 2005, is vacated since the joint status report submitted by the parties obviates the need for the conference. The following order issues based on the parties' joint status report and available dates.

SANCTIONS

On June 3, 2005, Plaintiff's counsel filed a response to the Order to Show Cause issued against Plaintiff and his counsel on March 30, 2005 ("OSC Response"). In the OSC Response counsel states a timely status report was not filed "Due to [counsel's] then lack of service," and because he "overlooked the requirement of this Court to file a status report." The status of service of process does not excuse Plaintiff's failure to file a timely status report because the Order Setting Status (Pretrial Scheduling) Conference filed January 20, 2005, prescribed:

The failure of one or more of the parties to participate in the preparation of the Joint Status Report does not excuse the other parties from their obligation to timely file a status report in accordance with this Order. In the event a party fails to participate as ordered, the party timely submitting the status report shall include a declaration explaining why it was unable to obtain the cooperation of the other party or parties.

(Jan. 20, 2005, Order at 2 n.2.)

Further, counsel's statement that he "overlooked" the requirement to file the status report is insufficient reason to avoid sanctions. It is "the professional duty of the attorney of record to ensure . . . that [counsel complies with Rule 16 filing deadlines]." Dela Rosa v. Scottsdale Mem'l Health Sys., Inc., 136 F.3d 1241, 1244 (9th Cir. 1998). Clearly judges should be expected to take action when Rule 16 filing deadlines are missed -- otherwise, a deadline ceases to be meaningful and simply serves as a useless goal to be considered by counsel when filing court documents. See Ayers v. City of Richmond, 895 F.2d 1267, 1270 (9th Cir. 1990) (affirming sanctions imposed on lawyer where "the date slipped by him") (internal quotation marks omitted). Ensuring that

1 a consequence exists for an unexcused tardily-filed document tends
2 to preserve the integrity of the Court's docket. "[W]e are dealing
3 with [a] matter critical to the court itself: management of its
4 docket, and the avoidance of unnecessary [delays in court
5 proceedings and the issuance of OSCs concerning why a document was
6 not filed on time]." Matter of Sanction of Baker, 744 F.2d 1438,
7 1441 (10th Cir. 1984).

8 [The] trial judge has an independent
9 responsibility to enforce the directives he has
10 laid down for the case. . . . "Rules are rules
11 - and the parties must play by them. In the
12 final analysis, the judicial process depends
13 heavily on the judge's credibility. To ensure
14 such credibility, a district judge must often
be firm in managing crowded dockets and
demanding adherence to announced deadlines. If
he or she sets a reasonable due date, parties
should not be allowed casually to flout it or
painlessly to escape the foreseeable
consequences of noncompliance."

15 Legault v. Zambarano, 105 F.3d 24, 28-29 (1st Cir. 1997) (quoting
16 Mendez v. Banco Popular de Puerto Rico, 900 F.2d 4, 7 (1st Cir.
17 1990)); Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 610
18 (9th Cir. 1992) ("A scheduling order 'is not a frivolous piece of
19 paper, idly entered, which can be cavalierly disregarded by counsel
20 without peril.' . . . Disregard of the order would undermine the
21 court's ability to control its docket . . . and reward the indolent
22 and the cavalier.").

23 Since Plaintiff's response is insufficient to avoid
24 imposition of sanctions, George R. Kucera is sanctioned ONE HUNDRED
25 FIFTY DOLLARS (\$150.00) for HIS failure to timely comply with the
26 January 20, 2005, Order. The sanctions shall be paid to the Clerk
27 of the Court of this District within fifteen (15) days from the
28 date this Order is filed. Proof of payment must be sent to the

undersigned Judge's chambers within five (5) days of payment. The sanction is personal to the attorney and is not to be transmitted to his client by way of a charge or attorney's fees and/or costs.

SERVICE OF PROCESS

The named defendant has been served and no further service is permitted, except with leave of Court, good cause having been shown.

JOINDER OF ADDITIONAL PARTIES/AMENDMENT

No further joinder of parties or amendments to pleadings is permitted except with leave of Court, good cause having been shown.

DISCOVERY

(a) All discovery shall be completed by March 10, 2006. In this context, "completed" means that all discovery shall have been conducted so that all depositions have been taken and any disputes relative to discovery shall have been resolved by appropriate orders, if necessary, and, where discovery has been ordered, the order has been complied with or, alternatively, the time allowed for such compliance shall have expired.¹

(b) Each party shall comply with Federal Rule of Civil Procedure 26(a)(2)'s initial expert witness disclosure and report requirements on or before October 11, 2005, and with the rebuttal

¹ The parties are advised that the Magistrate Judges in the Eastern District are responsible for resolving discovery disputes. See Local Rule 72-302(c)(1). Accordingly, counsel shall direct all discovery-related matters to the Magistrate Judge assigned to this case. A party conducting discovery near the discovery "completion" date runs the risk of losing the opportunity to have a jurist resolve discovery motions pursuant to the Local Rules.

1 expert disclosures authorized under the Rule on or before
2 November 14, 2005.

3 MOTION HEARING SCHEDULE

4 The last hearing date for motions shall be May 22, 2006,
5 at 9:00 a.m.²

6 All purely legal issues are to be resolved by timely
7 pretrial motions. Motions shall be filed in accordance with Local
8 Rule 78-230(b). Opposition papers shall be filed in accordance
9 with Local Rule 78-230(c). Failure to comply with this local rule
10 may be deemed consent to the motion and the Court may dispose of
11 the motion summarily. Brydges v. Lewis, 18 F.3d 651, 652-53 (9th
12 Cir. 1994). Further, failure to timely oppose a summary judgment
13 motion may result in the granting of that motion if the movant
14 shifts the burden to the nonmovant to demonstrate a genuine issue
15 of material fact remains for trial. Cf. Marshall v. Gates, 44 F.3d
16 722 (9th Cir. 1995). When the last day for filing an opposition
17 brief falls on a legal holiday, the opposition brief shall be filed
18 on the next court day immediately following the legal holiday. See
19 Fed. R. Civ. P. 6(a).

20 Any party bringing a motion to dismiss, motion for
21 summary judgment or summary adjudication, motion for judgment on
22 the pleadings, or motion to remand shall attach to the motion a
23 copy of the latest complaint (or cross-complaint where applicable).

24 In determining any motion for summary judgment, the Court
25 will assume that the material facts as claimed in the movant's
26

27 ² This time deadline does not apply to motions for continuances,
28 temporary restraining orders, emergency applications, or motions under
Rule 16(e) of the Federal Rules of Civil Procedure.

1 Statement of Undisputed Facts and adequately supported by evidence
2 are admitted without controversy except to the extent that such
3 material facts are (1) disputed in the nonmovant's response to the
4 movant's "Statement of Undisputed Facts," and (2) controverted by
5 declaration or other written evidence filed in opposition to the
6 motion. See L.R. 56-260(b); Nilsson, Robbin, et al., v. Louisiana
7 Hydrolec, 854 F.2d 1538, 1545 (9th Cir. 1988). A party opposing a
8 motion for summary judgment must serve upon all parties and file
9 with the Clerk of Court the evidence upon which the opposing party
10 will rely in opposition to the motion fourteen days before the
11 scheduled hearing date. L.R. 78-230(c), 56-260. Evidence not
12 timely filed by a party will not be considered. See Marshall v.
13 Gates, 44 F.3d at 725.

14 Absent highly unusual circumstances, reconsideration of a
15 motion is appropriate only where:

16 (1) The Court is presented with newly discovered
17 evidence that could not have reasonably been discovered prior to
18 the filing of the party's motion or opposition papers;

19 (2) The Court committed clear error or the initial
20 decision was manifestly unjust; or

21 (3) There is an intervening change in controlling law.
22 A motion for reconsideration based on newly discovered evidence
23 shall set forth, in detail, the reason why said evidence could not
24 have reasonably been discovered prior to the filing of the party's
25 motion or opposition papers. Motions for reconsideration shall
26 comply with Local Rule 78-230(k) in all other respects.

27 The parties are reminded that motions in limine are
28 procedural devices designed to address the admissibility of

evidence and are cautioned that the Court will look with disfavor upon motions³ presented at the final pretrial conference or at trial in the guise of motions in limine. The parties are further cautioned that if any legal issue which should have been tendered to the Court by proper pretrial motion requires resolution by the Court after the established law and motion cut-off date, substantial sanctions may be assessed for the failure to file the appropriate pretrial motion and/or the Court may elect not to decide the motion and to treat it as untimely. See U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099, 1104 (9th Cir. 1985) (affirming district court's denial of untimely motion since "pretrial order controls the subsequent course of action unless modified by a subsequent order"), rejected on other grounds, Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1174 (9th Cir. 1995); Dedge v. Kendrick, 849 F.2d 1398 (11th Cir. 1988) (same).

FINAL PRETRIAL CONFERENCE

The final pretrial conference is set for July 24, 2006, at 1:30 p.m. The parties are cautioned that the lead attorney who WILL TRY THE CASE for each party shall attend the final pretrial conference. In addition, all persons representing themselves and appearing in propria persona must attend the pretrial conference.

The parties shall file a JOINT pretrial statement with the Court not later than seven (7) days prior to the final pretrial conference.⁴ The Court uses the parties' joint pretrial statement

³ Such motions include contentions under the collateral estoppel or res judicata doctrines.

⁴ The failure of one or more of the parties to participate in the preparation of any joint document required to be filed in this case (continued...)

1 to prepare its final pretrial order. The final pretrial order
 2 supersedes the pleadings and controls the facts and issues which
 3 may be presented at trial. Issues asserted in pleadings which are
 4 not preserved for trial in the final pretrial order cannot be
 5 raised at trial. Hotel Emp., et al. Health Tr. v. Elks Lodge 1450,
 6 827 F.2d 1324, 1329 (9th Cir. 1987) ("Issues not preserved in the
 7 pretrial order are eliminated from the action.").

8 The following provisions of Local Rule 16-281 shall apply
 9 with respect to the matters to be included in the joint pretrial
 10 statement: (b) (1), (b) (2),⁵ (b) (3), (b) (5), (b) (9), (b) (10),
 11 (b) (11),⁶ (b) (12) to and including (b) (21), and (c).

12 The subject matter in Local Rule 16-281(b) (4), (b) (7),
 13 and (b) (8) shall be combined in a single section titled "Factual,
 14 Legal and/or Equitable Contentions."⁷ In the "Factual, Legal
 15

16 ⁴(...continued)
 17 does not excuse the other parties from their obligation to timely file
 18 the document in accordance with this Order. In the event a party fails
 19 to participate as ordered, the party timely submitting the document
 shall include a declaration explaining why it was unable to obtain the
 cooperation of the other party or parties.

20 ⁵ In this section of the joint pretrial statement the parties
 21 must specify what the judge is expected to decide and what the jury is
 22 expected to decide. For instance, if the judge is expected to make a
 ruling after the jury decides factual disputes, the factual issues to be
 submitted to the jury shall be specified.

23 ⁶ In separate attachments to the joint pretrial statement each
 24 party shall list all witnesses and each exhibit individually that the
 25 party intends to offer at trial. Plaintiff's exhibits shall be listed
 numerically; defendant's exhibits shall be listed alphabetically.

26 ⁷ If there are no legal or equitable contentions, the title
 27 shall reflect only what is at issue. The requirement in (b) (8) is
 28 modified since a party only needs to state sufficient law to show
 viability of an issue. But it must be clear whether precise federal or
 state law governs. If state law governs, the state whose law is
 (continued...)

1 and/or Equitable Contentions" section, the parties shall number or
 2 alphabetize each individually-pled cause of action and pled
 3 affirmative defense to preserve the issue for trial. **Each pled**
 4 **claim or affirmative defense must be accompanied by the elemental**
 5 **facts supporting it and the relief sought, if applicable. For**
 6 **example: Plaintiff claims that Defendant violated her Fourth**
 7 **Amendment right to be free from excessive force by applying the**
 8 **handcuffs too tight and seeks general damages.** If the parties
 9 disagree about the inclusion of an issue in this section, that
 10 issue shall be followed by the title "Controversy", under which the
 11 parties' respective positions on the issue shall be stated. The
 12 parties are warned that the "Factual, Legal and/or Equitable
 13 Contentions" section of the joint pretrial statement could be used
 14 to specify the issues preserved for trial in the pretrial order,
 15 and that order could issue without the court holding the scheduled
 16 final pretrial conference. See Mizwicki v. Helwig, 196 F.3d 828,
 17 833 (7th Cir. 1999) ("There is no requirement that the court hold a
 18 pretrial conference."). **Thus, if an issue is omitted from this**
 19 **section of the joint pretrial statement, it is waived, even if it**
 20 **appears in the pleadings.** Valley Ranch Dev. Co. v. F.D.I.C., 960
 21 F.2d 550, 554 (5th Cir. 1992) (indicating that an issue omitted
 22 from the pretrial order is waived, even if it appeared in the
 23 pleading); cf. Raney v. District of Columbia, 892 F. Supp. 283
 24 (D.D.C. 1995) (refusing to modify the pretrial order to allow

25
 26 ⁷(...continued)
 27 applicable must be specified. Since the governing law is stated in
 28 conjunction with the elemental facts to establish a pled claim or
 defense, there is no need for a separate statement of disputed factual
 issues required by (b)(4). The relief sought, referenced in (b)(7),
 shall follow the issue or issues giving rise to that relief.

1 assertion of a previously-pled statute of limitations defense);
2 Olympia Co., Inc. v. Celotex Corp., 597 F. Supp. 285, 289 (E.D. La.
3 1984) (indicating that "[a]ny factual contention, legal contention,
4 any claim for relief or defense in whole or in part, or affirmative
5 matter not set forth in [the pretrial statement] shall be deemed .
6 . . withdrawn, notwithstanding the contentions of any pleadings or
7 other papers previously filed [in the action]").

8 The parties are further warned that "since [the] process
9 [of having them delineate trial issues] is designed to promote
10 efficiency and conserve judicial resources, 'there is no reason to
11 require that the elimination of non-trialworthy claims await a
12 formal motion for summary judgment.'" Berkovitz v. Home Box
13 Office, Inc., 89 F.3d 24, 29 (1st Cir. 1996). "If the pretrial
14 [statement] discloses that no material facts are in dispute and
15 that the undisputed facts entitle one of the parties to judgment as
16 a matter of law," the Court may summarily dispose of the case or
17 issue. Portsmouth Square v. Shareholders Protective Comm., 770
18 F.2d 866, 868-69 (9th Cir. 1985) (emphasis added).

19 If possible, at the time of filing the joint Pretrial
20 Statement counsel shall also email it in a format compatible with
21 WordPerfect to: geborders@caed.uscourts.gov.

22 SETTLEMENT CONFERENCE

23 No settlement conference is currently scheduled. The
24 parties shall address in their joint pretrial statement whether
25 they wish to have a judge-assisted settlement conference. If
26 counsel wish the trial judge to act as settlement judge, written
27 stipulations to this effect which waive the judge's
28 disqualification from later acting as the trial judge must be filed

1 prior to the scheduling of the settlement conference. See Local
2 Rule 16-270(b). If the parties wish to participate in Court-
3 assisted settlement prior to the final pretrial conference, they
4 should contact the Deputy Clerk.

5 TRIAL SETTING

6 Trial is set for October 31, 2006, commencing at
7 9:00 a.m.

8 MISCELLANEOUS

9 The parties are reminded that pursuant to Fed. R. Civ. P.
10 16(b), the Status (pretrial scheduling) Order **shall not be modified**
11 **except by leave of Court upon a showing of good cause. Counsel are**
12 **cautioned that a mere stipulation by itself to change dates does**
13 **not constitute good cause.**

14 OBJECTIONS TO STATUS (PRETRIAL SCHEDULING) ORDER

15 Any party may, within ten (10) court days after the date
16 this Order is filed, file and serve written objections to any part
17 of this Order. Any objection must specify the requested
18 correction, addition, and/or deletion. Any response to an
19 objection must be filed and served within ten (10) court days after
20 the objection is filed.

21 IT IS SO ORDERED.

22 Dated: June 13, 2005

23 /s/ Garland E. Burrell, Jr.
24 GARLAND E. BURRELL, JR.
25 United States District Judge
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27
28